



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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No. 1062

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HERMAN C. HANCOCK, JR.,

*Petitioner,*

*vs.*

OLIVER H. STOUT, COLONEL, ARMY OF THE UNITED  
STATES, AS COMMANDING OFFICER OF THE GREENVILLE ARMY  
AIR BASE, GREENVILLE, SOUTH CAROLINA

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**BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI**

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**Opinions Below**

1. An Opinion written by Hon. George Bell Timmerman, United States District Judge (R. 35), is reported in 55 F. Supp. 330.
2. The Opinion of the Circuit Court of Appeals (R. 46), is reported in 146 F. (2d) 741.

**Jurisdiction**

The judgment by the Circuit Court of Appeals for the Fourth Circuit, reversing the judgment of Hon. George Bell Timmerman, United States District Judge, was entered

December 20, 1944 (R. 53). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347 (a)).

### **Question Presented**

1. The only question presented in this petition is whether a two-thirds vote of the members of a general court martial present at the time the vote is taken is sufficient to convict an accused of the crime of rape in violation of Article of War 92; or whether the concurrence of all the members of a general court martial present at the time the vote is taken is required to support such a conviction.

### **Statutes Involved**

Articles of War 43 and 92 (41 Stat. 795 and 805; 10 U. S. C. A. 1514 and 1564) provide:

AW 43: No person shall, by general court martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote.

AW 92: Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court martial may direct; but no person shall be tried by court martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

### Statement

A general court martial was convened at Greenville Army Air Base, Greenville, South Carolina, on October 23, 1943, at which time the petitioner was arraigned on the charge of rape in violation of the 92nd Article of War. Upon his arraignment, the petitioner entered a plea of not guilty and upon trial was found guilty of rape as follows:

“Upon secret written ballot, three-fourths of the members present at the time the vote was taken concurring in each finding of guilty, the Court finds the accused:

“Of the Specification, Charge I: Guilty”.

Thereafter, the Court voting separately as to the sentence, sentenced the petitioner as follows:

“The Court was closed, and upon secret written ballot three-fourths of the members present at the time the vote was taken concurring, sentenced the accused:

To be dishonorably discharged from service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the rest of his natural life.”

The record of the trial was held legally sufficient by the Board of Reviews with the concurrence of the Judge Advocate General, to support the sentence adjudged, and on April 1, 1944, the Commanding General issued and published an Order directing execution of the sentence, designating the United States Penitentiary at Atlanta, Georgia, as the place of confinement.

On April 14, 1944, the petitioner filed his petition for a writ of habeas corpus in the United States District Court for the Western District of South Carolina, which was granted. On May 26, 1944, after a full hearing, the Dis-

trict Court issued its Opinion sustaining the writ of habeas corpus and holding that the crime of rape (Article of War 92) requires a unanimous vote of guilty by the members of the court martial sitting at the time the vote was taken (Article of War 43); that the court martial having failed to secure the necessary votes for conviction, in effect had acquitted the petitioner of the charge of rape and that the sentence thereafter imposed was a nullity.

On June 17, 1944, the District Court issued an Order releasing the petitioner from the custody of Oliver H. Stout, Colonel and Commanding Officer of the Greenville Army Air Base, under the sentence imposed by the said court martial on petitioner's conviction of rape.

Oliver H. Stout, respondent in the original petition for habeas corpus, thereupon appealed to the Circuit Court of Appeals for the Fourth Circuit from said judgment and Order of the District Court, and the Circuit Court of Appeals on December 20, 1944, filed its Opinion reversing the District Court.

### **Specifications of Error to Be Urged**

The Circuit Court of Appeals erred:

1. In reversing the action of the District Court in sustaining petitioner's writ of habeas corpus and discharging petitioner from the custody of Oliver H. Stout, Colonel, Army of the United States, as Commanding Officer of the Greenville Army Air Base, Greenville, South Carolina.
2. In holding that a two-thirds vote of the members of a general court martial present at the time the vote is taken is sufficient, under Article of War 43, to convict an accused of the crime of rape in violation of Article of War 92.
3. In holding that a conviction of the crime of rape by a two-thirds vote of all of the members present, the Court

could force a sentence of death or life imprisonment when the 43rd Article of War provides, among other things, that no person shall be "sentenced to life imprisonment nor to confinement for more than ten years except by concurrence of three-fourths of all of the members present at the time the vote is taken."

### **Argument**

In the present case, the petitioner was convicted of the crime of rape by a concurrence of three-fourths of the members of the court martial present at the time the vote was taken. Article of War 92, under which the accused was convicted and sentenced, reads as follows:

"Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court martial may direct; but no person shall be tried by court martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

Under the provisions of this Article, the crime of rape is a capital offense and is expressly made punishable by death or life imprisonment. Article of War 43, which in its present form was adopted by Congress on June 4, 1920, reads as follows:

"No person shall, by general court martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court martial, may be determined by a two-thirds vote

of those members present at the time the vote is taken. All other questions shall be determined by a majority vote."

Under the terms of this Article, how many votes are required to convict an accused of the crime of rape?

Is there any language in Article of War 43 which provides for the conviction of the accused of the crime of rape by a three-fourths vote? The petitioner does not think there is any such provision, and the respondent seems to have reached the same conclusion.

The petitioner contends that no person can be convicted of the capital offense of rape except by the concurrence of all of the members of the court martial present at the time the vote is taken.

#### 1. *The History of Article 43, Articles of War of 1920.*

A brief review of the history of changes made in the law from time to time will be helpful in arriving at a correct construction of this Statute.

For many centuries in the past, nations have had various forms of Articles of War for the administration of justice in the Army and Navy. The American colonies inherited Articles of War perhaps along with the Common Law of England. As far back as June 30, 1775, the Colonies adopted a form of Articles of War and again on September 20, 1776, Articles of War were published to govern the Armies of the United States.

A Statute was enacted by Congress on April 10, 1806 containing a new version of Articles of War. In none of these Statutes, however, is there any provision as to how many votes are required to convict or sentence, and it seems that in all cases, both conviction and sentence were governed by the same number of votes; to-wit: a simple majority.

On June 22, 1874, Congress adopted new Articles of War containing Article 96, which read as follows:

“No person shall be sentenced to suffer death, except by concurrence of two-thirds of the members of a general court martial, and in cases herein expressly mentioned.”

This Act of 1874, adopted shortly after the Civil War, increased the number necessary to sentence to death from that of a simple majority to that of a two-thirds majority, and used a phrase which has followed this Article down to the present, to-wit: “and in cases herein expressly mentioned.” A fair interpretation of this Statute is that no person could be sentenced to death, in cases herein expressly mentioned, except by concurrence of two-thirds of the members of a general court martial. The absence of the word “convict” in Article 96 is very significant.

On August 29, 1916, shortly before the United States entered World War I, the Congress adopted another set of Articles of War and Article 96 was replaced with Article 43—not the present Article 43, however. This Article read as follows:

“No person shall, by general court martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death except by the concurrence of two-thirds of the members of the said court martial and for an offense in these Articles expressly made punishable by death.

“All other convictions and sentences, whether by general or special court martial, may be determined by the majority of the members present.”

It will be observed that the only change made by the Act of 1916 was to require a two-thirds vote, both to convict and sentence in capital cases. Under the Article 96, as adopted by Congress in 1874, the two-thirds rule applied only to the



sentence. Under Article 43 of the Act of 1916, it was made to apply also to the conviction. Unless this interpretation is correct, the word "convict" in Article 43, passed in 1916, is without meaning. At the end of the first sentence in Article 43, a similar phrase to that contained in Article 96 was added "and for an offense in this article expressly made punishable by death." This Act clearly provides that it shall take a two-thirds vote to convict and to sentence where a crime is a capital offense. This is made doubly apparent by the sentence which follows, wherein both the words "convict" and "sentence" are used and whereby it is provided that all other convictions and sentences shall be determined by a majority vote.

After World War I the Congress, evidently having in mind the experiences in courts martial proceedings during that war, decided to change the 1916 Article of War 43 and on June 4, 1920, the present 43rd Article of War was adopted. It is for the construction of this Article that the parties are now before this Court, the petitioner contending that under the present law it takes a unanimous vote to convict of a capital offense.

## 2. *Discussion.*

It must be kept in mind that from the beginning of our constitutional government, a unanimous verdict is required to convict a citizen of the most trivial offense. No person in the civil courts of the United States can be convicted by a jury unless all of the members of the jury agree that he is guilty. Up to the present time, this requirement has been found satisfactory. It would be a most natural thing for the Congress of the United States to feel after World War I that it was necessary to require a unanimous vote of a general court martial in order to convict a citizen of so serious an offense as a capital crime. Surely it cannot be successfully contended that courts martial in time of war

are better fitted to decide and administer justice than the civil courts. As a matter of fact, under the strain of war injustice is much more likely to occur. The Congress evidently had this in mind and decided to change the rule and require a unanimous vote to convict and sentence in capital cases.

The 43rd Article of War is divided into three sentences, each complete in itself. The first sentence lays down the law as to the number of votes required to convict and sentence in all capital cases in which the death penalty is either made mandatory or is expressly provided for in the Articles of War. The second sentence states the number of votes required to convict and to sentence in all other cases. The third sentence provides that all questions not relating either to the conviction or sentence of any crime shall be decided by the majority of votes.

It must be kept in mind that there is a definite distinction between the conviction of the accused and the sentence. A defendant cannot be sentenced until after he has been convicted. In fact, the Court Martial Manual provides that after the accused has been convicted, the Court will reopen and receive evidence of the record of the accused, including evidence of any previous military convictions. The whole purpose of receiving this additional evidence is to assist the Court in deciding what sentence to impose. Paragraph 79, Manual for Court Martial, 1928, reads as follows:

“In the event of conviction of an accused, the court will open for the purpose of receiving as evidence such data as to his age, pay, service as may be shown on the first page of discharge sheet, and of giving the trial Judge Advocate an opportunity of introducing evidence of the accused's previous convictions by court martial. This evidence and any evidence of previous punishment under Article 104 is for the consideration of the court in fixing the kind and amount of punishment.”

After a man has been convicted, his record may determine whether he gets the death penalty or life imprisonment. The 43rd Article of War provides that no person shall be convicted nor sentenced to death except by the concurrence of all of the members where death is mandatory or where the crime is expressly made punishable by death. In other words, where the death penalty may be imposed after he has been convicted, it takes all to convict and it takes all to sentence to death and it goes on to provide that where it is a discretion, the Court may "sentence to life imprisonment or confinement for more than ten years by a three-fourths vote of the members present." In other words, it is manifest that it takes all the votes to convict where the death penalty is involved, and all to sentence to death, but three-fourths may give life or ten years. Surely it would not require more votes to sentence to life than to convict where death is a possible penalty.

The petitioner has been convicted by a three-fourths vote. Where is there in the Statute a single expression which may be construed to say that the petitioner may be convicted by a three-fourths vote? Can the language at the end of the first sentence in the Article "nor sentence to life imprisonment—except by the concurrence of three-fourths of all the members present" be interpreted to say "nor convicted and sentenced"? If the Congress had intended to provide for the conviction by three-fourths vote, it would have said so. No one seriously contends that there is any provision in the 43rd Article of War for the conviction of any crime by a three-fourths vote.

It is contended by the Government that under the 43rd Article of War the petitioner may be convicted of the crime of rape by a two-thirds vote instead of a unanimous vote. In the present case, if the petitioner may be convicted by a two-thirds vote of the members of court martial, we would

have a most unusual situation. Under the provisions of the 92nd Article of War, the crime of rape carries, upon conviction, only two possible penalties—death or life imprisonment. If it be held that the petitioner could be convicted of the crime of rape by a two-thirds vote, then when he is convicted the least penalty the law provides for the crime of rape is life imprisonment, but Article of War 43 says that no person can be sentenced to life imprisonment except by the concurrence of three-fourths of the members present at the time the vote is taken. The one-third of the Court who believes the petitioner innocent surely would not be willing to vote life imprisonment. The result would be that after the petitioner has been convicted, no punishment will be possible.

If we apply the Unit Rule hereinafter mentioned, and seek to compel the one-third majority group to vote life imprisonment, then the Court has really convicted and sentenced the petitioner to life imprisonment by two-thirds vote directly in violation of that provision of the Statute which requires a three-fourths vote to sentence to life.

It is especially important to the petitioner that we consider the variation as to the number of votes required to convict under the provisions of the 43rd Article of War, together with what is known as a Unit Rule in military procedure. Under the Unit Rule when a general court martial passes upon any question, even though it be the guilt or innocence of the accused, each member of the Court becomes absolutely bound by such findings and must not thereafter question whether or not the decision arrived at is right or wrong. Even in a case where a member believes the accused innocent and so votes, when it comes to fixing the sentence, such member is duly bound to accept as absolutely true that the accused is guilty and he must vote for such penalty as he would think proper if he thought the

defendant were guilty. So, in the present case, when a vote was taken upon the issue as to the petitioner's guilt or innocence and decided in the affirmative by a vote of two-thirds of the members present, that issue goes out of the case and must be accepted as a true finding of each and every member of the Court. Thus, it will be seen that it is highly prejudicial to the petitioner to have the general court martial vote upon his guilt or innocence and decide such issue by a two-thirds vote when the law requires a unanimous vote of all of the members present. In the instant case the minority group who voted for the acquittal of the accused, though believing him innocent, when voting upon the proper sentence might believe that under the law that anyone guilty of rape should be sentenced to death; and under the Unit Rule would be forced to hang the petitioner for this crime when they really, conscientiously, and honestly believed him to be innocent. This is peculiarly important in trials by general courts martial, because the Court acts as both judge and jury. The Court finds the verdict and, likewise, imposes the sentence, and there is no distinction in the duties and powers of the court martial in the conviction and sentencing of the accused.

To show how definitely this Unit Rule is fixed and applied in Military Courts, the following is quoted from *Winthrop's Military Law and Procedure*, published by the War Department as information for the Service, Public Document 1001, at page 292:

“A marked diversity of opinion once prevailed upon the point whether the members (where the sentence was discretionary) were obliged to vote a sentence without regard to what may have been their vote upon the finding,—whether in other words, those who had voted for an acquittal might not properly be excused from voting a punishment. At the first impression it might be unreasonable and inconsistent that a members, fully

persuaded that the accused was innocent or at least that the evidence had failed to convict him beyond a reasonable doubt, and who had voted accordingly, in the minority, for an acquittal, should at the next moment be required to adjudge that a specific punishment be imposed upon him as a guilty person. But this apparent inconsistency disappears when the principle is recalled, which has heretofore been set forth as resulting from the fundamental rule of government of the majority in court martial proceedings; viz., that the finding, when completed, becomes the act and judgment of the court as a *unit*, the opinions of the majority and minority no longer existing as such but being absorbed in the conclusion of the whole. While, therefore, the accused has been found guilty, the conviction is to be recognized and acted upon by each member as a fixed fact,—as something which has formed out of the region of individual opinion and become ascertained and concluded. Though he may not have voted not guilty, he is to vote upon the sentence precisely, as if he had voted for a conviction, or as if the fact of guilt had been determined by some competent agency wholly independently of himself, and the righteousness of such determination was beyond question.

“Further he must not only vote a sentence—but when the punishment is discretionary—an adequate sentence, i. e., one commensurate to the offense or offenses found. If, having voted to acquit, he gives his vote for a slight and inadequate penalty, he fails in his duty as an officer and member of the court.”

To illustrate further how important this is to the petitioner, let us suppose that there were nine members of the Court sitting at the time the vote was taken; three of whom believe the petitioner to be innocent, six of whom believe him to be guilty. Under the contention of the Government, the petitioner would then stand convicted of the crime of rape. The Court would then be reopened and later closed for the purpose of sentencing the petitioner.

The three members of the Court who believe the petitioner innocent are bound by the Unit Rule and they must accept as a fact when they vote upon his sentence, that he is guilty of the crime charged. The only question left upon which these men can vote is whether or not he should be sentenced to death or life imprisonment. There are only two sentences which can be imposed by court martial for one found guilty of the crime of rape; that is, death or life imprisonment. The law-makers, however, realized how important it is to have a vote of all members present in a trial of such offenses, because the 43rd Article of War provides that no person shall even be sentenced for more than ten years except by the concurrence of three-fourths of all of the members present at the time the vote is taken.

It is quite evident that to sustain the contention of the Government, we must read something into the 43rd Article of War which is not there. If this Court sustains the contention of the petitioner, we have a statute which is enforceable, logical, and reasonable. That is to say, that the 43rd Article of War should be construed by this Court to mean that it takes all the votes to convict of a capital offense, and all the votes to sentence to death. It takes three-fourths vote to sentence to life and for more than ten years, and it takes two-thirds vote to impose a sentence less than ten years.

This is a criminal statute and it must be construed strictly and in favor of the petitioner. The general rule of construction as stated in *American Jurisprudence, Statutes, Section VI, Interpretation, sub-section (2), Particular Kinds of Statutes*, Paragraphs 408 and 409, pages 432-434, is as follows:

“408. *Statutes Subject to Strict Construction as Penal Statutes.*—The ordinary application of the rule of penal statutes is to statutes that impose punishment for the commission of a crime. However, the rule as to strict

construction of penal law is also applied to statutes not strictly criminal but of that nature. It prevails as to retaliatory statutes, and statutes which impose penalties or forfeitures which provide for a recovery of damages beyond just compensation of the party injured, or which authorize punishment for contempt. As to the construction of statutes defining misdemeanors, greater latitude is said to be exercised by the courts than in the case of statutes which deal with greater offenses and which more immediately affect individuals than the general public. Indeed, it has even been held in some cases that the rule which requires criminal statutes to be construed strictly applies to those only of a highly penal character, not to mere misdemeanors.

409. *Application of Strict Construction.*—In the interpretation of a penal statute, the tendency is to give it careful scrutiny, and to construe it with such strictness as to safeguard the rights of the defendant. If the statute contains a patent ambiguity, and admits of two reasonable and contradictory constructions, that which operates in favor of a party accused under its provisions is to be preferred, and where there is any well-founded doubt as to any act being a public offense, it should not be declared such, but should rather be construed in favor of the liberty of the citizen. Hence, penal statutes are not to be extended in their operation to persons, things, or acts not within their descriptive terms, or the fair and clear import of the language used. Acts in and of themselves innocent and lawful cannot be held to be criminal unless there is a clear and unequivocal expression of the legislative intent to make them such. Whatever is not plainly within the provisions of a penal statute should be regarded as without its intendment. Such a statute should not be interpreted to impose restrictions on conduct not specifically enumerated in the legislative act, or to include cases omitted by the legislature, and which do not fall within the scope of the law. The fact that the statute may be easily evaded furnishes no excuse for supplying by judicial construction that which is palpably omitted



therefrom. These rules prevail even though the court thinks that the legislature ought to have made the statute more comprehensive."

In the case of *Willberger v. United States*, 5 Wheat. 628, Chief Justice Marshall makes his observation,

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment."

Mr. Justice Butler in the case of *United States v. Resnick*, 299 U. S. 207, says:

"Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used."

In the case of *Harrison v. Voss*, 50 U. S. 272, the Court says:

"In the construction of a penal statute all reasonable doubt concerning its meaning should operate in favor of the defendant."

Judge Phillips (10th Circuit) in the case of *Farmer v. United States*, 128 Fed. (2d) 970, says:

"A criminal statute must be strictly construed. Ambiguities in criminal statutes should not be resolved so as to embrace offenses not clearly within the law. The facts charged and proved must bring the defendant plainly and unmistakably within the statute."

In the case of *Pierce v. United States*, 314 U. S. 311, we find the following:

"These legislative extensions of the scope of the Act were in accord with the growing importance of the

administrative corporation, but a comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of common law that crimes must be defined with appropriate definiteness. While the act should be interpreted 'so as to give full effect to its plain terms' we should not depart from the words and context."

In the case of *Marchise v. United States*, 126 Fed. (2d) 671, Judge Sibley of the 5th Circuit Court of Appeals says:

"Title III of the Act, 18 U. S. C. A. 502, is applicable in peace time as an ordinary criminal statute. Its meaning ought justly to be gathered from its words as promulgated to the public rather than from expressions of legislators or even of their committees pending its passage. And a real doubt as to the meaning of the law ought to be given in favor of the accused, just as a real doubt as to his act or intent ought to be."

It necessarily follows, since the accused was found guilty of the crime of rape by a concurrence of only three-fourths of the members present at the time the vote was taken, instead of by the concurrence of all the members of the Court present at the time the vote was taken, as required by Article of War 43, petitioner has been acquitted, and the life sentence imposed by the General Court Martial a nullity.

### Conclusion

For the foregoing reasons judgment of the Circuit Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

ALFRED F. BURGESS,  
THOMAS A. WOFFORD,  
*Attorneys for Petitioner.*